23. Under BellSouth's proposal, the consumer will be saddled with new terms and conditions as a pre-condition to switching his or her voice service provider. As noted above, the proposal states that "BellSouth.net will contact the end user . . . [and] will discuss the terms and conditions of the transfer with the end user."

24. Supra submits that the above stated BellSouth conditions are "additional barriers" that the Commission expressly forbade BellSouth to maintain. For example, the consumer will be required to accept the following pre-conditions: (1) to pay a higher rate to maintain his or her FastAccess service, (2) to possess a credit card (failure to posses a credit card will disqualify the consumer, preventing the consumer from switching) and then provide that credit card number to BellSouth for billing purposes, and (3) that BellSouth will downgrade the quality of the service.

25. BellSouth's additional requirements of higher rates, credit cards and inferior service quality, along with a contact - seeking approval of these onerous pre-conditions - with the end user prior to BellSouth permitting the consumer to switch, Supra submits is not consistent with this Commission's decision (1) that "a customer's Internet access service would **not** be altered when the customer switched voice providers" and (2) that there "**shall be a seamless transition** for a customer changing voice service from BellSouth." FDN Recon Order at pgs. 5-6.

26. BellSouth's proposal further states: that "if the end user does accept the terms and conditions [e.g. rate changes, billing changes, data only] BellSouth.net will obtain the appropriate billing information from the end user." "At this time an order will be placed by BellSouth.net to have the appropriate line installed at the end user location." *See* Exhibit A, pg. 2. (Emphasis added).

27. The above emphasized language is BellSouth's pre-condition that no consumer, with FastAccess, will be permitted to switch voice providers unless he or she has first obtained a second "line installed at the end user location." Supra submits that this pre-condition is inconsistent with

Commission Order No. PSC-02-0878-FOF-TP issued on July 1, 2002, as so clarified in Commission Order No. PSC-02-1453-FOF-TP issued on October 21, 2002.

28. On November 2, 2002, David A. Nilson, Supra Vice-President, Technology, sent a letter to Shamron Wilder (BellSouth). In this letter, Mr. Nilson states that BellSouth's proposal is inconsistent with Commission Order No. PSC-02-1453-FOF-TP and as such the proposal is rejected. *See* November 2, 2002 Letter attached hereto as **Exhibit B**.

29. Thereafter, Shamron Wilder (BellSouth) sent Supra a second letter dated November 22, 2002. *See* Letter attached hereto as **Exhibit C**. In this letter, BellSouth sets forth <u>new additional conditions</u> for a customer who wishes to switch his local voice provider along with many of the same conditions outlined in its August 26, 2002 Letter.

30. One new pre-condition is the following: "BellSouth shall have no obligation to provide FastAccess to a Supra end user if such end user did not have FastAccess for at least 60 days prior to the time Supra submits the LSR to convert voice to Supra." *See* Exhibit C, pg. 2.

31. Supra submits that the Commission's Orders never contemplated any such 60-day minimum requirement.

32. A second new additional barrier is a modification to BellSouth's initial pre-condition which mandated a rate increase for the consumer to retain the FastAccess service. *See* Exhibit A.

33. Under the November 22nd proposal, BellSouth now couches the rate increase in terms of a BellSouth discount. Specifically, BellSouth proposes that the "end user will no longer be eligible for any discounts on FastAccess associated with the purchase of other BellSouth products."

34. BellSouth currently provides a $10 discount for FastAccess for customers that also subscribe to BellSouth's local voice service.

35. Supra submits that the cost of FastAccess service for customers who switch their local service from BellSouth to Supra will increase in the amount of $10.

36. Supra submits that these new pre-conditions (e.g. 60-days minimum requirement and increased rates) create new additional barriers and are inconsistent with this Commission decision in Order No. PSC-02-0878-FOF-TP as clarified by Order No. PSC-02-1453-FOF-TP in which this Commission wrote: "BellSouth's migration of its FastAccess Internet Service to an FDN [and Supra] customer **shall be a seamless transition** for a customer changing voice service from BellSouth to FDN **in a manner that does not create an additional barrier** to entry into the local voice market." (Emphasis added).

37. Supra submits that the entire November 22, 2002 Letter and its attached proposal is in direct violation of Commission Order No. PSC-02-0878-FOF-TP as so clarified by Commission Order No. PSC-02-1453-FOF-TP.

38. As noted earlier herein, Commission Order No. PSC-02-1453-FOF-TP specifically rejected BellSouth's request for clarification. In particular, BellSouth asked this Commission to "clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over a new loop that it installs to serve the end user's premises." Id. at pg. 5.

39. Commission Order No. PSC-02-1453-FOF-TP was issued on October 21, 2002.

40. BellSouth sent Supra a letter dated November 22, 2002 [*See* Exhibit C] in which BellSouth proposed to Supra the very BellSouth policy that this Commission had rejected thirty-two (32) days earlier.

41. Supra submits that the November 22, 2002 Letter demonstrates that BellSouth's violation of Order No. PSC-02-0878-FOF-TP as so clarified by Commission Order No. PSC-02-1453-FOF-TP is intentional and willful.

42. On November 27, 2002, Supra sent BellSouth a response to BellSouth's November 22nd Letter. *See* Letter attached hereto as **Exhibit D**. Supra noted in its response that BellSouth's proposal was again inconsistent with prior Commission Orders and was therefore rejected.

43. Acting in good-faith and in an attempt to resolve this matter amicably, Supra attached a proposal to its November 27th response outlining inherent problems with BellSouth's proposal and offering a different approach that Supra believed was consistent with the letter and spirit of the Commission's Orders.

44. In reply, BellSouth sent to Supra a letter dated December 2, 2002. *See* Letter attached hereto as **Exhibit E**. In this December 2nd letter, BellSouth rejects Supra's November 27th proposal in its entirety.

45. As noted earlier herein, the BellSouth November 22nd proposal requires the consumer to obtain a second line, among other onerous pre-conditions. This proposal was explicitly rejected by this Commission in Order No. PSC-02-1453-FOF-TP issued on October 21, 2002.

46. Despite this explicit rejection, BellSouth's Shamron Wilder wrote the following in her December 2nd Letter: "The policy I sent you [November 22nd] is the one BellSouth has offered to FDN in accordance with the FDN order that you referenced in your letter." The FDN Order referenced in Supra's November 27th Letter was Order No. PSC-02-1453-FOF-TP issued on October 21, 2002 -- thirty-two (32) days <u>prior</u> to BellSouth's letter.

47. BellSouth's policy and proposal of providing Stand-alone FastAccess DSL service is contrary to this Commission's Orders.

48. Supra submits that this December 2nd Letter further demonstrates an intentional and willful violation on the part of BellSouth of Commission Order No. PSC-02-0878-FOF-TP as so clarified by Order No. PSC-02-1453-FOF-TP.

49. Further negotiation with BellSouth over the proper implementation of this Commission's Orders became futile in light of BellSouth's next line: "To the extent Supra places orders for UNE-P lines where the end user wants to retain the FastAcccss service, <u>this is the process BellSouth will use</u>." *See* Exhibit E. (Emphasis added).

50. As a result of BellSouth's willful and intentional failure to abide by Commission Order No. PSC-02-0878-FOF-TP as so clarified by Order No. PSC-02-1453-FOF-TP, Supra has been forced to seek relief from this Commission.

51. The primary purpose of this Complaint is to evaluate whether BellSouth violated Commission orders and Florida Statutes and whether to impose a penalty therefore.

52. Pursuant to Rule 25-22.036(3)(b)(4), Florida Administrative Code, Supra respectfully requests that this Commission order BellSouth to immediately comply with Commission Order No. PSC-02-0878-FOF-TP as so clarified by Order No. PSC-02-1453-FOF-TP.

53. Pursuant to Section 364.285(1), Florida Statutes, Supra respectfully requests that this Commission impose a penalty of Twenty-Five Thousand ($25,000.00) Dollars for each day that BellSouth refused to comply with the Commission's orders.

54. Pursuant to Section 364.285(1), Florida Statutes, Supra also respectfully requests that this Commission suspend or revoke any certificate(s) BellSouth must maintain in order to operate in the State of Florida.

WHEREFORE, Supra respectfully requests that this Commission enter an order against BellSouth as follows:

1.) Ordering BellSouth to comply with this Commission's Orders and the parties Present Interconnection Agreement;

2.) Ordering BellSouth to pay penalties for violating this Commission's Orders, Commission Rules, and Chapter 364, Florida Statutes and for its continued anticompetitive behavior resulting in a barrier to competition; and

3.) For all other relief deemed appropriate under the law.

RESPECTFULLY SUBMITTED this 18th day of December, 2002.

SUPRA TELCOMMUNICATIONS &
INFORMATION SYSTEMS, INC.
2620 S.W. 27th Ave.
Miami, Florida 33133
Telephone: 305.476.4252
Facsimile: 305.443.9516

By: Jorge L. Cruz-Bustillo, [signature]
Jorge L. Cruz-Bustillo,
Florida Bar No. 0976441

EXHIBIT "5"

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CINERGY COMMUNICATIONS COMPANY FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO U.S.C. SECTION 252	)))))	CASE NO. 2001-00432

O R D E R

On July 12, 2002, the Commission, by Order, addressed the disputed issues between Cinergy Communications Company ("Cinergy") and BellSouth Telecommunications, Inc. ("BellSouth") in this arbitration proceeding. The parties disputed whether BellSouth should be required to furnish to Cinergy, on an unbundled network element ("UNE") basis, certain network elements, including the digital subscriber line access multiplexer ("DSLAM") port and broadband transport. The Commission concluded that unbundling packet-switching would create a disincentive for investment in these technologies by incumbent local exchange carriers ("ILECs"). The provision of packet-switching as a UNE may, in the long term, discourage future investments by BellSouth and by Kentucky's other ILECs if those investments would be required to be shared with competitors. Thus, as a matter of public interest, the Commission denied Cinergy's request to unbundle packet-switching as a UNE.

The parties also disputed whether BellSouth should continue its current policy of refusing to provide its digital subscriber line ("DSL") service to customers who choose a competitive LEC ("CLEC") for voice utilizing the UNE platform ("UNE-P"). The Commission found that BellSouth's practice of denying DSL to a CLEC's UNE-P customers undercuts the Commission's long-held policy of encouraging UNE-based voice competition and, in the long run, would result in fewer viable CLECs and fewer customer options. The Commission ordered the practice to cease.

BellSouth and Cinergy have both applied for clarification or rehearing of the Commission's Order. Cinergy has requested rehearing of the issue of unbundling packet-switching as a UNE. BellSouth and Cinergy both have requested clarification of the Commission's decision concerning provision of BellSouth DSL service over CLEC UNE-P lines. BellSouth prefers that the Commission reconsider its decision but, in the alternative, asks for clarification. On August 21, 2002, the Commission granted the motions for clarification of BellSouth and Cinergy in order to clarify the July 12, 2002 Order. The Commission's determinations in this arbitration proceeding are clarified herein.

Cinergy asserts that the Commission failed to apply the "necessary" and "impair" analysis required by 47 U.S.C. Section 251(d)(2) and as delineated by the U. S. Court of Appeals for the District of Columbia in United States Telephone Association v. Federal Communications Commission, 290 F.3d 415 (D.C. Circuit 2002). However, the Commission's July 12, 2002 Order clearly states that the record in this case does not establish that Cinergy's obtaining UNEs in addition to DSL-capable loops is "necessary" to enable it to provide service. That Order also explains that packet-switching will not be required to be unbundled in Kentucky as a matter of public interest. The Commission expressed concern that unbundling packet-switching would create

The Commission, having considered the motions and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. To protect the provision of competitive voice service in Kentucky, BellSouth shall not refuse to provide any DSL service to a customer on the basis that a customer receives UNE-P-based voice service from a CLEC.

2. BellSouth shall not require a DSL customer to pay loop costs of a separate loop simply because the customer receives voice from a competitor on a UNE-P basis.

3. Within 20 days of the date of this Order, the parties shall file their final interconnection agreement containing terms consistent with the July 12, 2002 Order as modified by this Order.

Done at Frankfort, Kentucky, this 15th day of October, 2002.

By the Commission

ATTEST:

Executive Director

EXHIBIT "6"

LOUISIANA PUBLIC SERVICE COMMISSION

CLARIFICATION
ORDER R-26173-A

Docket R- 26173, Louisiana Public Service Commission, ex parte. In re: BellSouth's provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission's directive in Order U-22252-E.

(Decided at the March 19, 2003 Business and Executive Session.)
(Clarifies Order R-26173 dated January 24, 2003)

I. BACKGROUND

The Louisiana Public Service Commission Staff ("Staff") filed its Final Recommendation in Docket Number U-22252-E, *In re: BellSouth's Section 271 Pre-application*, on August 31, 2001. Among the numerous issues addressed therein was a discussion of MCI WorldCom Communications, Inc.'s ("WorldCom") contentions regarding BellSouth Telecommunication's, Inc. ("BellSouth") practices in line splitting arrangements.[1] Staff described its understanding of the policy as follows: "BellSouth will not provide a customer with its retail DSL service unless that customer also purchases its voice service from BellSouth."[2] After discussing the matter in greater detail, Staff ultimately recommended the following:

> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.[3]

Staff's Final Recommendation, in docket U-22252, Subdocket E, was considered by the Louisiana Public Service Commission ("LPSC", "Commission") at its September 19, 2001 Business and Executive Session. At that Session, Commissioner Blossman moved to adopt Staff's Final Recommendation, with a few modifications, one of which directly addressed the above quoted section. The motion directed Staff to further study the issue

[1] Staff's Final Recommendation, Docket U-22252-E, pages 86-87.
[2] Id at 86.
[3] Id at 113.

of whether BellSouth should be required to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice services. The motion was unanimously adopted by the Commission and memorialized in Order U-22252-E, issued September 21, 2001.

In compliance with the Commission's directive, Staff opened and published the following in the Commission's Official Bulletin dated December 7, 2001 Docket R-26173,

> Pursuant to the Commission's directive in Order U-22252-E, Staff was to further study the issue of whether BellSouth Telecommunications, Inc. should be required to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice services.

Parties were given 25 days to intervene and/or file comments in the docket. Interventions and/or initial comments were received from the following parties: ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom ("DeltaCom"), Xspedius Corporation ("Xspedius"), Cox Louisiana Telecom, L.L.C., d/b/a Cox Communications ("Cox"), NewSouth Communications Corporation ("NewSouth"), Access Integrated Networks, Inc. ("Access"), BellSouth, KMC Telecom, Inc. ("KMC") and the Southeastern Competitive Carriers Association ("SECCA").

Following the receipt of initial comments, Staff received both formal and informal requests from the interveners to file additional/reply comments. By notice dated May 9, 2002, Staff granted the parties the opportunity to file additional comments by May 24, 2002. The following parties provided additional/reply comments: BellSouth, KMC, SECCA and WorldCom. Access, DeltaCom, NewSouth and Xspedius jointly filed reply comments.

After thoroughly reviewing all initial and reply comments, Staff issued a Proposed Recommendation on July 10, 2002. In order to clarify the opportunity for exceptions and replies to the recommendation, a Procedural Schedule and Order was issued on July 25, 2002. Exceptions were received only from BellSouth. Reply comments were received from KMC, WorldCom and SECCA and jointly from DeltaCom, Access, NewSouth and Xspedius. Additionally, an informal technical conference was held on September 3, 2002, with representatives from all of the above parties present. In connection with its review, Staff prepared a detailed summary of all initial and reply comments which was included in the Proposed Recommendation issued July 10, 2002. A short summary of the exceptions and replies to the Proposed Recommendation are included herein.

II. JURISDICTION

The powers and duties of the Louisiana Public Service Commission are contained in Article IV § 21 of the Louisiana Constitution of 1974. As stated therein, the Commission has the authority to:

> "regulate all common carriers and public utilities and has all other regulatory authority as provided by law. The Commission shall adopt and enforce reasonable rules, regulations and procedures which are necessary for the discharge of its duties including other powers and duties as provided by law."

Pursuant to its constitutional authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market ("Local Competition Regulations", "Regulations")[4], as most recently amended by the April 5, 2000 General Order ("General Order"). As stated in the Preamble to the Regulations,

> Through the development of effective competition, which promotes the accessibility of new and innovative services at non-discriminatory prices consumers can and are willing to pay, and which results in wider deployment of existing services at competitive prices, the public interest will be promoted.

Section 201. A. of the Local Competition Regulations describes the public policy as follows:

> (T)he Louisiana Public Service Commission hereby finds, determines and declares that the promotion of competition in all local telecommunications markets in Louisiana is in the public interest.

In furtherance of the above stated goal to promote competition in all local telecommunications markets in Louisiana, this Commission has initiated a number of rule-making proceedings. One such proceeding, Docket U-22252-C *In re: BellSouth Telecommunications, Inc. Service Quality Measurements*, established performance measurements to monitor the service BellSouth provides to its competitors. No less than four orders have been issued in that docket, all of which have fostered the Commission's goals of promoting competition. Further, Docket U-24714, Subdocket A, *In re: Final*

[4] The actual Regulations are contained in "Appendix B" to the General Order.

Deaveraging of BellSouth Telecommunications, Inc., UNE Rates, established new cost based rates for UNEs available to CLECs. Staff notes that following the issuance of the Order in that docket, many new competitors have entered the market. Additionally, in connection with Staff's review of BellSouth's 271 pre-application filing in Docket U-22252-E, several recommendations were made to further promote competition.

III. SUMMARY OF STAFF'S PROPOSED RECOMMENDATION

In Docket U-22252-E, Staff made the following recommendation:

> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop. Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved.

When the matter was considered at the Commission's September 2001 Business and Executive Session, the Commission voted to accept Staff's Recommendation, with Staff directed to determine whether ADSL service could be added to UNE lines in the future.[5] Order U-22252, E memorialized the Commission's vote, instructing Staff to,

> further study the issue of requiring BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service until such time as the operational and policy issues associated therewith are fully explored.[6]

Based on the above, a presumption existed that Staff's Recommendation in Docket U-22252, E should be adopted, absent any "operational or policy issues" prohibiting its implementation. Comments received from the parties suggested additional concerns must also be addressed, as evidenced by comments received relative to possible jurisdictional and technical issues. Neither the vote of the Commission, nor the directive of the order, suggested any such issues were a concern prior to this docket being opened. Nonetheless, to insure all issues are thoroughly explored, Staff's Proposed

[5] See Official Transcripts of the September 21, 2001 Business and Executive Session.
[6] Order U-22252, E.

Recommendation addressed not only "operational and policy" issues, but jurisdictional and technical issues as well. Based on the following conclusions, it was Staff's opinion that the recommendation set forth in docket U-22252-E be reaffirmed and adopted.

A. Policy Issues

Before addressing any "policy" arguments made by the parties, Staff reminded that parties that this Commission's policy, as stated in the Local Competition rules, is to promote competition in all telecommunications markets. Adopting Staff's Recommendation in U-22252, subdocket E will promote that goal, by allowing more end-users to choose an alternative voice provider without fear of losing their DSL service. BellSouth's policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the Commission's policy to encourage competition. Likewise, BellSouth's contention that such a regulation would diminish competition in the DSL market is not consistent with the comments received.

Pursuant to its current DSL policy, BellSouth "simply chooses not to sell DSL service that work on CLEC loops."[7] As summarized in KMC's comments, BellSouth's policy actually deters customers from switching to other providers, thus hindering competition not only in the voice market, but the DSL market as well. Various other examples of the anti-competitive effects of this policy were contained in the CLEC's comments[8], including (1) disconnection of BellSouth DSL service when an end-user changes voice providers, (2) placing codes on Customer Service Records ("CSRs") that must be removed before transferring service, (3) placing DSL service on primary lines in multi-line situations without explaining the consequences to the end-user and (4) transferring back voice service if BellSouth's DSL is subsequently placed on the primary line. Interestingly enough, the only of the above examples BellSouth addressed in its reply comments is the primary line issue, referring Staff to the FCC's 271 order. BellSouth's failure to even dismiss or deny the other examples caused Staff grave concern, as any of the above puts a voice CLEC in a clear competitive disadvantage by

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[7] See reply affidavit of Thomas G. Williams filed June 25, 2001 in Docket U-22252-E at page 11.
[8] A detailed summary of the initial comments filed by all parties is contained in Staff's Proposed Recommendation issued in this docket on July 10, 2002.

creating more "hoops" a CLEC must jump through to provide voice service, as outlined in Staff's summary of the individual comments.

Rather than discuss the above concerns, BellSouth argued the Commission should make inquiries relative to the investments, personnel and taxes CLECs have made in Louisiana before it makes a decision. *Staff was at a loss as to how any of this information, if obtained, would be of any benefit to the Commission or Staff.* In furtherance of this position, BellSouth filed a Motion for Leave to Propound Data Requests on June 28, 2002. Staff was concerned this filing could not only result in an unnecessary delay in the issuance of Staff's Recommendation, but also could broaden the scope of the docket beyond the Commission's directive.

In conclusion, the Commission's policy is to support competition in all telecommunications markets, including local voice service. *The anti-competitive affects of BellSouth's policy* are at odds with the Commission's, and thus should be prohibited.

B. Jurisdictional Issues

While "jurisdictional issues" were not contemplated in the Commission's directive, Staff believed it was important to address this Commission's jurisdiction and how it is consistent with that of the FCC. BellSouth's argued the LPSC has no jurisdiction to regulate the provisioning of its DSL service over CLEC voice loops. This argument is couched on the presumption that Staff's recommendation would essentially amount to LPSC regulation of DSL, which is a federally tariffed service. This argument fails to consider the basis of Staff's Recommendation in U-22252-E, i.e. the anticompetitive effect BellSouth's practice has on CLEC voice customers in violation of relevant LPSC, as well as FCC, rules and regulations, by restraining voice competition. Despite BellSouth's arguments to the contrary, Staff's Recommendation in docket U-22252-E is entirely consistent with the *Telecommunications Act*, the Line Sharing Order and Line Sharing Remand Order.

The prevailing theme of the Local Competition Regulations is the Commission's goal of promoting competition in the local telecommunications market. Conversely, any practice that has a detrimental effect on competition is inconsistent and should be rectified. Further, Section 701 of the Local Competition Regulations, which established

BellSouth's Consumer Price Protection Plan, provides in Section 701 G. 10, "Tying arrangements are prohibited."[9] Staff concluded that not only is BellSouth's current practice regarding the provisioning of its DSL service anti-competitive, it is also a "tying arrangement." Simply put, BellSouth, as the dominant voice and DSL provider in Louisiana, is tying the provision of its DSL service to its voice service. Only end-users who receive voice service from BellSouth, or end-users of a CLEC reselling BellSouth's voice service, may receive BellSouth DSL.

Claims that various RBOCs are behaving in an anti-competitive matter concerning the provision of their DSL services to voice service are not new. In support of their policy, RBOCs have continuously argued the provision of DSL is federally regulated and as such cannot be addressed by state commissions. WorldCom's first raised this issue in Louisiana in its reply comments filed in Docket U-22252-E.[10] To Staff's knowledge, the RBOC argument has never been successful, as each state commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior.[11]

In addition to orders cited by the CLECs, the Michigan Public Service Commission, in an order issued in Case No. U-13193 on June 6, 2002 ("Michigan Order"), determined that Ameritech's practices concerning the provisioning of its DSL services were anti-competitive and therefore violated state law.[12] As was the case in the Florida Order, the Michigan Commission addressed issues identical to those being considered in this docket. Staff's Recommendation in U-22252-E, and its recommendation herein, are consistent with both orders.

BellSouth's was correct in saying the FCC's Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider.[13] However, neither the Line Sharing Order, nor the Line Sharing Remand Order prohibited states from regulating anti-competitive behavior or illegal tying arrangements. In fact, the FCC specifically stated in the Line Sharing Remand Order,

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[9] A similar provision applying to all certificated TSPs is contained in Section 301 J. 2 of the Local Competition Regulations.
[10] Staff's recommendation in U-22252-E was based on its consideration of those initial comments, as well as BellSouth's subsequent reply
[11] See California Order at pages 6-11, Florida Order at pages 7-9.
[12] See Michigan Order at page 15.
[13] As a reminder, the DC Circuit has vacated the Line Sharing Order.

> To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action.

Clearly the above pronouncement grants this Commission authority to rule on the issue before it without infringing on the FCC's jurisdiction, as the LPSC is acting in furtherance of its goal (and the FCC's) to promote competition, not attempting to regulate DSL service.

Staff concluded that any perceived conflicts between FCC and LPSC jurisdiction raised by BellSouth should be of no concern to this Commission, as it clearly has the authority to determine BellSouth's practices are contrary to LPSC rules and regulations, without fear of infringing on the FCC's jurisdiction or non-regulated areas.

C. Technical Issues

Staff's discussion of technical issues will be brief. Simply put, there is no technical reason set forth by BellSouth or the CLECs as to why BellSouth's DSL service cannot be provisioned over CLEC voice loops. As mentioned throughout this recommendation, BellSouth's current practice is based on an internal policy decision.

D. Operational Issues

As set forth in Staff's Recommendation in docket U-22252-E, BellSouth's obligation to provide its DSL service over CLEC voice loops could be stayed if BellSouth provided evidence of "substantial operational issues" that must be resolved. Essentially this docket gives the parties the opportunity to review any such operational issues prior to any Commission Order being issued.

As summarized herein, all operational issues addressed by BellSouth in its comments involve additional costs it believes it would incur if it loses control of the local loop, but is still required to provide its DSL service. In response to these operational issues, Staff first notes that in U-22252-E, Staff recommended that CLECs not be allowed to charge BellSouth for use of its UNE loops. Despite the fact that SECCA has suggested otherwise, Staff had no intention of modifying that portion of the recommendation. Therefore, any concerns relative to costs assessed to BellSouth for using the CLEC loop are moot.

Interestingly enough, the remainder of operational issues raised by BellSouth are arguably the same operational issues that exist for competitive DSL providers that do not control the voice portion of the loop. Any DLEC or CLEC providing DSL services only (i.e., one that is not also the voice provider) is in the same position. However, BellSouth argued such an arrangement causes operational issues that would drive up the costs of its DSL. As an alternative, BellSouth proposed CLECs convert UNE loops of BellSouth DSL customers to resale, thereby allowing BellSouth to continue controlling the loop. As evidenced by the comments, not only was such a suggestion infeasible to some CLECs, it would only increase the costs and operational issues associated with providing voice service. Staff was not convinced that any of the operational issues provided by BellSouth were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers. If anything, they suggested to Staff that BellSouth is leveraging position as the dominant voice provider with control of the network, to give itself another advantage over CLEC DSL providers.

Accordingly, Staff reemphasized its U-22252-E recommendation to make it clear that BellSouth should not only be required to provision its DSL service to end-users over CLEC voice loops, but must do so utilizing the same non-discriminatory rates, terms and conditions it provides such services to its voice customers, as BellSouth's comments suggest it may simply raise the price of DSL to CLEC voice customers in such a fashion that Staff's Recommendation is rendered moot.

IV. <u>SUMMARY OF BELLSOUTH'S EXCEPTIONS TO STAFF'S PROPOSED RECOMMENDATION</u>

BellSouth's exceptions to Staff's Proposed Recommendation were filed on August 12, 2002, along with three affidavits. As set forth in the filing, BellSouth took exception with Staff's Recommendation in six specific areas, arguing: 1. The Commission's Rules of Practice and Procedure do not authorize Staff to proceed in the manner it did in this docket; 2. The Commission does not have jurisdiction to alter or otherwise regulate BellSouth's Interstate Services; 3. Staff's Presumption that the Commission has prejudged this matter is wholly inappropriate; 4. CLEC Profit Margin, not customer choice is the core issue; 5. Operational issues exist and 6. KMC's

Complaints referred to by Staff are unfounded. Rather than provide an exhaustive summary of these comments, Staff responded to the exceptions in its Final Recommendation.

V. CLEC REPLY COMMENTS

As mentioned infra, reply comments to BellSouth's Exceptions were received from WorldCom, SECCA, KMC, Access, DeltaCom, Xspedius and NewSouth. These reply comments addressed BellSouth's exceptions, provided support for the adoption of Staff's Proposed Recommendation, and included affidavits and other exhibits as attachments. No exceptions to Staff's Proposed Recommendation were received from the CLECs. Similarly as with BellSouth's comments, rather than providing an exhaustive summary of the reply comments, Staff addressed the comments in its Final Recommendation.

VI. INFORMAL TECHNICAL CONFERENCE

Following receipt of BellSouth's exceptions and the replies thereto, Staff presided over an informal technical conference. Representatives of BellSouth, several CLECs, as well as Commissioners Blossman and Sittig and Commission Staff, were present at the technical conference. The parties were given an opportunity to respond to the latest filings, ask and field questions and provide further support for their respective positions. Particularly, BellSouth witness Ruscilli went into detail explaining why he concluded in his affidavit that resale is a valid option for the CLECs and BellSouth witness Milner explained his affidavit relative to Operational Issues. Following BellSouth's presentations, CLEC witnesses were given the opportunity to respond and/or ask questions of the witnesses. Questions were also posed by the Commissioners and Staff. Specifically questions were asked as to who would invest in order to ensure the entire state has DSL available. No affirmative response to deploy was received from the CLECs. In addition to the exceptions and replies, Staff considered this information in support of its recommendation.

VII. STAFF'S FINAL RECOMMENDATION

As stated herein, Staff's role in this docket was to determine whether any policy or operational issues existed that would prohibit BellSouth from providing its ADSL service over CLEC loops. That is precisely what Staff considered in detail in its Proposed Recommendation, with Staff ultimately concluding that no such operational or policy issues existed. As no exceptions were provided by the CLECs, Staff's Final Recommendation focused on BellSouth's Exceptions and any impact they had on Staff's Proposed Recommendation.

A. Staff's Reply to Exceptions 1 and 3.

Interestingly, BellSouth began its exceptions not by questioning Staff's Proposed Recommendation, but by questioning the rulemaking procedure employed. BellSouth concluded the procedure violated not only the Commission's Rules of Practice and Procedure, but also Article IV § 21 of the Louisiana Constitution. BellSouth suggested as a remedy the Commission opening up a docket to establish concrete rules for such proceedings. A simple review of recent Commission history would question the correctness of this assumption. Staff, through the undersigned counsel, has been either counsel of record or co-counsel of record in numerous Commission rulemaking proceedings (and all of which included BellSouth as a party) in which essentially the same procedural rules were followed, without objection from BellSouth or others.[14]

Further troubling was BellSouth's statement that it was under the impression "Staff would consider the issues presented in this docket in a full and comprehensive manner as the 271 Order requires."[15] Staff assumed BellSouth's was suggesting Staff's consideration of rounds of comments and exhibits received by the parties, numerous informal meetings addressing the issues, review of relevant FCC, LPSC and other PSC decisions, the result of which was a 24 page recommendation, was insufficient. The presumption referred to by Staff, to which BellSouth takes exception, did not in any way diminish the amount of consideration, time and effort that went into Staff's

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[14] U-23445, U-23446, U-24050, U-25754, R-26171 and R-26438 were all Rulemaking dockets involving Telecommunications issues. In most instances, fewer comments were received than allowed in this proceeding. Further, BellSouth did not question the procedure followed herein until after Staff's Recommendation, which took a contrary position, was issued.

[15] BellSouth's Exceptions to Staff's Proposed Recommendation at page 5.

Recommendation. It was only after consideration of all information contained in this record that Staff issued its Proposed Recommendation. Nonetheless, any attempts to suggest the Procedure followed herein by Staff were inconsistent with the Commission's Rules and Regulations should be simply dismissed as an effort to create additional issues the Commission must consider.

B. Staff's Reply to Exception 2.

BellSouth also raised many of the same jurisdictional issues contained in its original comments in its exceptions. BellSouth suggested the effect of Staff's recommendation would be the imposition of disincentive to the deployment of DSL service, rather than the goal of promoting the accessibility of new and innovative services. Such a statement creates a slippery slope for Staff (and BellSouth) to tread upon. How can the Commission promote the deployment of a service over which BellSouth argues it has no jurisdiction over? Should Staff assume it is ok for the Commission to establish rules relative to interstate services, provided they only benefit the provider of such services?

By no means was Staff suggesting this recommendation would amount to a regulation of DSL services, however, it is interesting that BellSouth would have the Commission believe the Recommendation would hinder the further deployment of such services. According to BellSouth's experts, approximately 70-75% of BellSouth customers in Louisiana have access to its DSL, while only 5% or so subscribe to it. Staff argued if any disincentive exists prohibiting BellSouth from further deploying its services, it was the demand for the product, not any order of this Commission. Staff's Recommendation, if adopted, would only require BellSouth to continue providing its DSL service to customers currently receiving the service when they switch voice providers, and to voice customers of CLECs opting to receive the service, essentially meaning BellSouth will derive more revenue for its non-regulated service, in addition to furthering competition in the voice market.

BellSouth also objected to Staff's classification that BellSouth is "tying" its DSL service to its voice service, suggesting Staff has transformed this proceeding into an enforcement action. BellSouth's suggestion disregards the fact that Staff had recommended no penalties, fines or other administrative remedies be levied against BellSouth, only that it (BellSouth) rectify any potential anti-competitive behavior. Staff agreed with SECCA that this Commission has the jurisdiction to rectify any potentially anti-competitive behavior without the necessity of instituting an enforcement action.

C. Staff's Reply to Exception 4.

In this exception, BellSouth provided arguments and testimony in support of its position that resale is a valid option for the CLECs, further arguing CLECs simply choose not to use it for cost reasons. While Staff appreciated BellSouth's comments relative to CLEC profit margins and the work done by Mr. Ruscilli relative to the costs associated with UNE-P versus resale, it respectfully disagreed with the conclusion. UNE-P has been recognized by this Commission as a valid form of competition, most recently in BellSouth's 271 application. As long as it is treated as such, CLECs should have the choice to determine how they choose to compete, rather than the choice being made by their competition. Not only does BellSouth's "Resale Option" restrict the mode of entry a CLEC can use, it also restricts the service offering that can be made to those services contained in BellSouth's tariffs. For example, a CLEC such as WorldCom could not offer its "Neighborhood" plan via resale because BellSouth provides no similarly bundled service it can resell.

D. Staff's Reply to Exception 5.

Despite what is suggested by the CLECs in their reply comments, Staff never determined there were no operational issues that may be incurred by BellSouth. Staff simply concluded that none of the issues were substantial enough to warrant BellSouth being absolved from following Staff's Proposed Recommendation. BellSouth's exceptions and affidavits shed further light on the potential operational issues it believes it will encounter if forced to implement Staff's Recommendation. While BellSouth qualified these operational issues as being burdensome, Staff believed the actual effect of the operational changes must specifically be determined before they absolve BellSouth from implementing Staff's Recommendation. For example, at least two of the operational issues raised by Mr. Milner in his affidavit were rendered moot by Staff's

Proposed Recommendation wherein Staff concluded that CLECs should be prevented from charging BellSouth for use of the high frequency portion of the loop. While there is some overlap, the majority of the remaining operational issues would only apply when BellSouth is required to provide its DSL over CLEC voice loops, not UNE-P. Nonetheless, based on the above, Staff was willing to clarify its recommendation to the extent that the operational issues related specifically to UNE loops (facilities based providers) are later determined to be overly burdensome. If such a determination were made, Staff would recommend that BellSouth be required to provide its DSL service only to CLEC customers via UNE-P, provided that BellSouth shall not prematurely disconnect voice and data service to a customer converting service from BellSouth to a facility based CLEC. Should a premature disconnection occur, BellSouth shall be fined up to $10,000.00 per occurrence, as well as provide a full refund to the customer for the previous month's voice and data service. Additionally, Staff noted that due to the regional nature of BellSouth's Operational Support Systems, any final decision of a Commission in the BellSouth region on this issue would require BellSouth to make the necessary operational changes, thereby re-instituting Staff's original recommendation.

E. Staff's Reply to Exception 6.

Finally, BellSouth suggests that Staff wrongfully relied on KMC's allegations, suggesting KMC has a history of make allegations without any factual support. Such a suggestion is obviously refuted by the information provided to Staff counsel by KMC in Docket U-22252-E and the series of Collaborative workshops, which were referenced in support of the finding. Copies of those filings are contained herein.

VIII <u>COMMISSION CONSIDERATION AND ISSUANCE OF ORDER R-26173</u>

For the reasons stated above, Staff recommended that its recommendation, as contained in docket U-22252-E, and as modified in this docket, be adopted. The matter was considered at the Commission's December 18,2002 Business and Executive Session. Following oral argument, Commissioner Field moved to accept Staff's Final Recommendation, adding the following provision: "The Louisiana Public Service Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale